LIBRARY
SUPREME COURT, U. S.

FILED
OCT 5 19
MICHAEL RODAK, JR.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1972

No. 72-5521

In the Matter of
Robert Satiacum
Petitioner

vs.

The State of Washington
Respondent

Petition for Writ of Certiorari to the
Supreme Court of the State of Washington

JACK E. TANNER
Attorney for Petitioner.
817 Puget Sound Bk. Bldg., Tacoma Washington 98402. Tel. 383-3568

Print Northwest

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1972

No. .....

In the Matter of

Robert Satiacum

Petitioner

vs.

The State of Washington

Respondent

Petition for Writ of Certiorari to the Supreme Court of the State of Washington

---

JACK E. TANNER

Attorney for Petitioner.

817 Puget Sound Bk. Bldg., Tacoma Washington 98402. Tel. 383-3568

Print Northwest

TABLE OF CONTENTS

PAGE

Opinions Below 12, 17, 18

Jurisdiction 4

Questions Presented 4

Statement of the Case 4, 5, 6

Reasons for Granting the Writ 6-11

I Substantial federal questions are involved in this case, and only this court can resolve the issues herein between treaty Indians and the State of Washington. There is substantial conflict between members of the Puyallup Tribe and the State of Washington over the Treaty of Medicine Creek.

II The Supreme Court of Washington was in error in the opinion which terminated both the Puyallup Indian Reservation and the Puyallup Tribe of Indians as to their treaty rights.

Conclusion 10, 11

CONSTITUTIONAL PROVISIONS

PAGE

Article VI, Section 6 28

Fourteenth Amendment, Section 1 32

TREATIES

Treaty of Medicine Creek 1855, 10 Stat. 1132 21

STATUTES

25 U.S.C.A., Chapter 14 8

24 Stat. 388 8

33 Stat. 565 9

34 Stat. 325, 377 9

34 Stat. 1015, 1050 9

53 Stat. 1405 9

18 U.S.C.A. 1151 10

18 U.S.C.A. 1152 10

EXECUTIVE ORDER

September 6, 1873, Part III (Puyallup Reserve) 29

CITATIONS

(1) *Department of Game v. Puyallup Tribe, Inc.* 70 Wn. 2d 245, 422 P. 2d 75 (1967) 7

(2) *Seymour v. Superintendent of Washington State Penitentiary* (1962) 82 S. ct. 424, 368 U.S. 351 8

(3) *The Puyallup Tribe, etc., v. Department of Game, of Washington*, et al. (247) 391 U.S. 392 6

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1972

No. _____

In the Matter of
Robert Satiacum
Petitioner

vs.

The State of Washington
Respondent

Petition for Writ of Certiorari to the
Supreme Court of the State of Washington

APPLICATION is hereby made by Jack E. Tanner, attorney of record for the above named petitioner in this case for a Writ of Certiorari to review the final order of the Supreme Court of the State of Washington.

OPINION BELOW

The opinion of the Supreme Court of Washington was entered on April 13, 1972, and a copy is appended hereto at page 12. The order denying the Petition for Reconsideration was entered on July 19, 1972, and a copy is appended hereto at page 17. The final order of the Supreme Court of the State of Washington, The Remittitur, was entered on July 20, 1972, and is appended hereto at page 18.

JURISDICTION

Petitioner submits that this court has jurisdiction of this matter under 28 U.S.C. Section 1257 (3), a copy of which is appended hereto at page 20.

QUESTIONS PRESENTED

(1) Does an Indian Reservation created by an Act of Congress cease to exist, whether or not officially terminated by an Act of Congress, when the land previously constituting the reservation has virtually all been sold to non-Indian owners?

(2) Can the courts of the State of Washington terminate the Puyallup Indian Reservation by court edict?

(3) Can the courts of the State of Washington terminate the Puyallup Indian Tribe by court edict?

(4) Is an individual Indian of Puyallup Tribal Descent and an enrolled member of the Puyallup Tribe, while exercising his tribal fishing rights within the original Puyallup Reservation boundaries subject to state police power jurisdiction?

STATEMENT

The petitioner herein was charged by information number 39491 in the Superior Court of Pierce County, Washington, with three misdemeanors. The misdemeanors were (1) possessing salmon taken from a salmon preserve for commercial purposes; (2) unlawful waste or destruction of food fish; and (3) unlawfully carrying a firearm. The evidence at the time of trial was uncontradicted that petitioner was an Indian and a member of the Puyallup Indian Tribe on the Puyallup River. (Statement of Facts, Pages 111, 112, 113, 114).

Petitioner moved, during trial (Statement of Facts 142) and after the verdict (Statement of Facts 164) to dismiss the charges against petitioner because of the lack of jurisdiction by the trial court. The motion as to jurisdiction was based upon the fact that petitioner was and is a duly enrolled member of the Puyallup Indian Tribe, and that he was exercising his tribal fishing rights at the time of his arrest, under the terms of the treaty of Medicine Creek of 1855, a copy of which is appended hereto at page 21. That in view of his treaty rights the Superior Court of Pierce County, Washington, lacked jurisdiction over him because of Article VI of the United States Constitution, the supremacy clause, a copy of which is appended hereto at page 28.

The trial court dismissed counts one and three of the information, but petitioner was found guilty of count two, the unlawful waste or destruction of food fish. He was sentenced to pay a fine of Seventy-five Dollars. Notice of appeal was timely given to the Supreme Court of the State of Washington. Two assignments of error on appeal were submitted to the Supreme Court. (1) The Trial Court erred in not granting appellants' motion to suppress the evidence, and (2) The Trial Court erred in not granting appellants' motion to dismiss the information because of lack of jurisdiction as to the case (Statement of Facts 141, 142). The motion to suppress evidence was made because of the lack of jurisdiction of the arresting officers on "Indian Land".

The parties entered into a stipulation and agreement as to Statement of Facts. The State did file a verbatim Statement of Facts in the case. But the evidence was at the time of trial, and is still uncontra-

dicted that the petitioner is an Indian, an enrolled member of the Puyallup Indian Tribe, and was fishing at the usual and accustomed fishing grounds and stations on the Puyallup River at the time of his arrest on July 29, 1970. The evidence in the case is uncontradicted that at the time of his arrest petitioner was within the original geographical area of the Puyallup Indian Reservation. (Statement of Facts 122).

On April 13, 1972, the Supreme Court of the State of Washington upheld petitioner's conviction in the trial court. Petitioner then timely filed his Petition for Reconsideration. The Petition for Reconsideration was denied.

REASONS FOR ALLOWANCE OF WRIT

(1) The history of turmoil and litigation between the State of Washington and Indian People in the State of Washington over treaty rights has been going on for many years. Substantial federal questions are raised in this case, such as does the state have jurisdiction over an Indian asserting treaty rights on his reservation, the authority of the State of Washington to terminate the Puyallup Indian Tribe by court edict, and the authority of the State of Washington to declare that there is no longer a Puyallup Indian Reservation and can an Indian Reservation be terminated other than by an express Act of Congress. The issues are of great importance to all parties concerned, and only this court can resolve them.

This court has on one occasion reviewed one of the provisions of the Treaty of Medicine Creek. Article III of the Treaty of Medicine Creek was before this court in the case of the Puyallup Tribe, etc. v. Department of Game of Washington et al. (No. 247) 391

U.S. 392. In that case this court said in footnote 1, "whether in light of this history the reservation has been extinguished is a question we do not reach". The court also said in that case that "While the Treaty of Medicine Creek created a reservation for these Indians, no question as to the extent of those reservation rights, if any, is involved here", footnote 1. The very existence of the Puyallup Indian Reservation, and the extent of those reservation rights are the issues in this case.

Petitioner submits that this court in the case cited above was only considering Article III of the Treaty as to off-reservation fishing by the Indians. The decision of this court in that case, that the State of Washington could regulate the manner of fishing and restricting commercial fishing in the interest of conservation is not applicable to this case. Petitioner at the time of his arrest at the mouth of the Puyallup River was well within the exterior geographical boundaries of the Puyallup Indian Reservation set by the terms of the Treaty of Medicine Creek and Executive Orders. There is no evidence to deny this fact. This case does not involve off-reservation Indian fishing. Petitioner is unaware of any statute or case law that gives the State of Washington jurisdiction to apply state law to on-reservation Indian fishing, nor did the State Court cite any authority applicable to this case.

(2) The Supreme Court of the State of Washington said in the case of *Department of Game v. Puyallup Tribe, Inc.* 70 Wn. 2d 245, 422P. 2d 754 (1967), that the Puyallup Indian Reservation has ceased to exist. The opinion in that case is the basis for the court's opinion in the case now before this court. There is no basis in law to support the opinion in either case.

The Puyallup Reservation was established by Article II of the 1854 Medicine Creek Treaty, ratified by Congress on March 3, 1855, 10 Stat. 1132. on authority of Article VI of the Treaty the Puyallup Reservation was enlarged by Executive Order of September 6, 1873, a copy of which is appended hereto at page 29. In the Executive Order of 1873 it was pointed out that "This would give them a mile of water frontage directly north of Puyallup River and free access to the waters of Commencement Bay at that point". All of the "usual and accustomed grounds and stations" referred to in Article III of the Treaty are within the exterior boundaries of the Puyallup Reservation. Petitioner is unable to find any authority to support the decision that the Puyallup Reservation has ceased to exist. The obvious question is when did it cease to exist? Petitioner is unaware of any Act of Congress that has terminated the reservation, or any decision of this court that terminated the Reservation. Nor has the Supreme Court of the State of Washington cited any authority. In fact, the decision in this case is contrary to law.

Whenever Congress has terminated an Indian Reservation it has always done so expressly. The Termination Acts in 25 U.S.C.A. Chapter 14 provides for the Termination of Indian Reservations. In *Seymour v. Superintendent of Washington State Penitentiary*, (1962) 82 S.C.T. 424, 368 U.S. 351, this court ruled that the termination of a reservation or removal of lands from the reservation must be done expressly by the Congress and not impliedly.

In footnote 1 of Case (No. 247), *supra*, this court pointed out that in 1887 Congress passed the General Allotment Act (24 Stat. 388) authorizing the division of the reservation land among the individual Indians.

By the Act of April 28, 1904, 33 Stat. 565, Congress gave the consent of the United States to the removal of prior restrictions on alienation by these Indians. Other Acts were passed by Congress providing for the sale of Puyallup Lands, Act of June 12, 1906, 34 Stat. 325, 377; the Act of March 1, 1907, 34 Stat. 1015, 1050, and the Act of August 11, 1939, 53 Stat. 1405. But, nothing in the above cited Acts terminates or constricts the reservation or its boundaries. The Supreme Court of the State of Washington said at page 2 of the opinion in this case, that "Regardless of whether the reservation has been officially and finally terminated by Act of Congress, we are convinced that the Federal Jurisdiction made applicable to Indian County by 18 U.S.C.A. 1152 has ceased to exist because the Puyallup Indians have sold virtually all of their lands, and because any distinct Indian Community recognized and treated as such by the United States Government has ceased to exist", is contrary to law.

(3) In *Department of Game v. Puyallup Tribe, supra,* the State Supreme Court said "We are satisfied that so long as the United States Government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do. The Superior Court for Pierce County cited without jurisdiction in making a judicial determination of the tribe's termination. Historically and uniformally the termination of federal supervision of an Indian Tribe has been accomplished by the Congress through enactment of legislation". The court has now reversed itself but cites no legal authority for so doing. Petitioner can find no authority nor does the opinion cite any to support the state court's opinion that the distinct Puyallup Indian Community has ceased to exist. This issue was never raised in the

trial court. Again an obvious question presents itself, and that is when did the distinct Puyallup Indian Community cease to exist?

(4) Since petitioner at the time of his arrest was exercising his fishing rights as a treaty Indian on the Puyallup Reservation. Petitioner would submit that 18 U.S.C. (1952 ed.) 1152 and 18 U.S.C. (1952 ed.) 1151 are applicable to this case. Did the Superior Court of Pierce County, Washington, have jurisdiction? "Indian County" is defined in 18 U.S.C. 1151 as follows:

"Except as otherwise provided in Sections 1154 and 1156 (which are not pertinent to the question before us) of this title, the term 'Indian Country' as used in this chapter means, (a) all land within the limits of any Indian Reservation under the jurisdiction of the United States Government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation".

Laws governing are provided for in 18 U.S.C. 1152 which is as follows:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

CONCLUSION

Petitioner submits that at the time of his arrest herein he was in Indian Country known as the Puyallup Indian Reservation (Statement of Facts, Pages 9, 10, 13, 51), and therefore any acts committed thereon were outside the jurisdiction of the Superior Court of Pierce County, Washington. Another question would seem

obvious here. If there once was a Puyallup Indian Reservation, and a Puyallup Indian Tribe at what time and specific date did the petitioner become subject to the police power jurisdiction of the State of Washingg-ton? Just when did the statute under which he was convicted become applicable to him? Petitioner is entitled to the protection of the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution, a copy of which is appended hereto at page 32.

Petitioner respectfully submits that the petition for a Writ of Certiorari should be granted.

JACK E. TANNER,

Counsel for Petitioner.

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[No. 42184 En Banc Apr. 13, 1972]

THE STATE OF WASHINGTON, *Respondent*,

v.

ROBERT SATIACUM, *Appellant*.

[1] States—Indians—Reservation—Termination. An Indian reservation ceases to exist, whether or not officially terminated by act of Congress, when the land previously constituting the reservation has virtually all been sold to private non-Indian owners and there is no longer in existence any distinct Indian community recognized and treated as such. An individual Indian of that tribal descent within the indicated geographical area is subject to state police power jurisdiction in common with other citizens.

[2] Appeal and Error—Assignments of Error—Argument in Support—Necessity. An appellant seeking review of a criminal case has the burden and obligation of examining the record and presenting to the court argument and authority in support of his contentions.

[3] Fish—Indians—Treaties—Right to Fish in Common With Others—Unlawful Waste of Fish. The right guaranteed by treaty to any Indian to fish "in common with all citizens of the Territory" does not provide a basis for excusing his violation of a statute prohibiting unlawful waste or destruction of food fish.

FINLEY, J.—This is an appeal from a conviction for the wasting of food fish in violation of RCW 75.12.120. On July 29, 1970, Robert Satiacum, a member of the Puyallup Indian Tribe, was arrested while fishing in the Puyallup River Salmon Preserve. He was subsequently charged with (1) possessing salmon taken from a salmon preserve for commercial purposes, (2) unlawful waste or destruction of food fish, prohibited by RCW 75.12.120, and (3) unlawfully carrying a firearm. At trials, the court granted defendant Satiacum's motion to dismiss charges (1) and (3), but denied the motion as to charge (2). Defendant also moved to suppress any and all evidence against him and to dismiss the information on the ground that the trial court lacked jurisdiction in the matter. Both motions were denied. The jury found the defendant guilty of unlawful waste or destruction of food fish. On November 17, 1970, the trial court denied defendant's motion for a new trial and imposed sentence, fining Mr. Satiacum $75.00 and court costs. He has appealed.

Appellant first contends that the trial court erred in failing to dismiss the information in this case for lack of jurisdiction. Though his brief on appeal provides neither authority nor reasoning to support his contention, he claims that our statement in *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn. 2d 245, 442 P.2d 754 (1967), that the Puyallup Indian Reservation has ceased to exist, is wrong.

We do not agree. For purposes of determining the jurisdiction of state or federal courts, the Puyallup Indian Reservation *has* ceased to exist. The lands which constituted the reservation (with the exception of two small tracts presently being used as cemeteries totaling 22 out of the original 18,000 acres) have been

sold to non-Indian citizens of this state pursuant to Act of April 28, 1904, ch. 1816, 33 Stat. 565 (1904), which authorized the Indians to convey their alloted lands in fee simple free of all restrictions. Regardless of whether the reservation has been officially and finally terminated by act of Congress, we are convinced that the federal jurisdiction made applicable to "Indian Country" by 18 U.S.C.A. §1152 has ceased to exist because the Puyallup Indians have sold virtually all of their lands, and because of any distinct Indian community recognized and treated as such by the United States government has ceased to exist. *See United States v. Sandoval*, 231 U.S. 28, 46, 58 L. Ed. 107, 34 S.Ct. 1 (1913).

Since the Indian lands have been sold and an Indian community no longer exists within the boundaries of the former Puyallup Indian Reservation, the State of Washington may, under the circumstances of this case, exercise its police power jurisdiction over Mr. Satiacum, a Puyallup Indian, in common with its jurisdiction over all other citizens of this state. In *Seymour v. Superintendent*, 368 U.S. 351, 7 L. Ed. 2d 346, 82 S.Ct.. 424 (1962), the United States Supreme Court overruled our decision supporting state court jurisdiction over a burglary committed in the Colville Indian Reservation. The result we reach in the instant case is consistent with the ultimate decision in *Seymour*, since in that case it appears that a recognizable Indian community had continued to exist on the reservation land, and the continued existence of that reservation and of federal jurisdiction over it had been implicitly recognized in several subsequent congressional enactments.

Appellant also contends that the trial court erred in refusing to grant his motion to suppress all evidence

against him in this case because he had not committed a crime of any kind at the time of his arrest. Again, there is no argument or legal authority in appellant's brief to support this contention. It is appellant's burden and obligation to examine the record and to present to this court any possible grounds upon which it might be said that "appellant had not committed a crime of any kind at the time of his arrest." He has not done so; in fact, all the evidence we find in the record supports his conviction.

We note in passing that if appellant's contention is that he did not commit a crime because he was merely exercising the fishing rights guaranteed to him by the Medicine Creek Treaty, any such contention is without merit in this case. The right to fish "in common with all citizens of the Territory" guaranteed by that treaty does not include the right wantonly to waste food fish. There can be no doubt that prohibition of the wasting of food fish is a conservation measure which is "reasonable and necessary to preserve the fishery," and is well within the police power of the state of Washington. *Department of Game v. Puyallup Tribe, Inc.*, *supra* at 261.

FINLEY, J.

WE CONCUR:

HAMILTON, C.J.
HALE, J.
ROSELLINI, J.
HUNTER, J.
UTTER, J.
NEILL, J.
STAFFORD, J.
WRIGHT, J.

No. 39491, Hardyn B. Soule, J., entered November 18, 1970. *Affirmed.*

Prosecution for violation of a fishing regulation, unlawful waste of food fish, and for unlawfully carrying a firearm. Defendant appeals from a conviction and sentence for waste of food fish.

APPENDIX B

No. 42184

ORDER

DENYING

PETITION FOR REHEARING

In the Supreme Court

OF THE

STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent*,

vs.

ROBERT SATIACUM, *Appellant*.

The Court having considered the appellant's petition for rehearing herein together with the respondent's answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 19th day of July, 1972.

By the Court:

ORRIS L. HAMILTON,
Chief Justice.

80 Wn. 2d 492

APPENDIX C

REMITTITUR

No. 42184

Pierce County No. 39491

IN THE SUPREME COURT

OF THE

STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,*

v.

ROBERT SATIACUM, *Appellant.*

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 13, 1972, became the final judgment of this court in the above entitled case on May 12, 1972. This cause is remitted to the superior court from which appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

No cost bill having been filed costs are deemed to have been waived. The Petition for Rehearing was denied by an order dated July 19, 1972.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 20th day of July, A.D. 1972.

WILLIAM L. LOWRY,
Clerk of the Supreme Court,
State of Washington.
By: REGINALD N. SHRIVEP

ff: Tanner & Burgess

Mr. Jack E. Tanner
Honorable Ronald L. Hendry
Court Reporter

Chairman, Board of Prison Terms and Paroles

APPENDIX D

28 U.S.C. 1157 (3)

Section 1257. State Courts; appeal; Certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. As amended July 29, 1970, Pub. L. 91-358, Title 1, Section 172 (a) (1), 84 Stat. 590.

APPENDIX E

TREATY

BETWEEN

THE UNITED STATES

AND THE

NISQUALLY AND OTHER BANDS OF INDIANS

FRANKLIN PIERCE

PRESIDENT OF THE

UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas a treaty was made and concluded on the Sre-nah-am, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded on the She-nah-am, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peek-sin, Squi-aitl, and S:-heh-wamish tribes and bands of Indians,

occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ART. I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Sat-sop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's island, easterly and southeasterly, to the place of beginning.

ART. II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: The small island called Kla-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Pearl's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-

nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ART. III. The right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ART. IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand and five hundred dollars, in the following manner, that is to say: For

the first year after the ratification hereof three thousand two hundred and fifty dollars; for the next two years three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ART. V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ART. VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof,

to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ART. VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ART. VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate his pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ART. IX. The above tribes and bands are desirous to exclude from the reservations the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided, that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ART. X. The United States further agree to establish at the general agency or the district of Puget's Sound, within one year from the ratification hereof and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of the said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agrees to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ART. XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ART. XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign

Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ART. XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent Territory of Washington.

QUI-EE-METL, SNO-HO-DUMSET, LESH-HIGH, SLIP-O-ELM, KWI-WATS, STEE-HIGH, DI-A-KEH, HI-TEN, SQUA-TA-HUN, KAHK-TSE-MIN, SONAN-O-YUTL, KL-TEHP, SAHL-KO-MIN, T'BET-STE-HEH-BIT, TCHA-HOOS-TAN, KE-CHA-HAT, SPEE-PEH, S W E - Y A H - T U M , C H A - ACHSH, PICH-KEHD, S'KLAH-O-SUM, SAH-LE-TATL, SEE-LUP, E-LA-KAH-KA, SLUG-YEH, HI-NUK, MA-MO-NISH, CHEELS, KNUTCANC, BATS-TA-KOBE, WIN - NE - YA, KLO-OUT, SE-UCH-KA-NAM, SKE-MAH-HAN, WUTS-UN-A-PUM, QUUTS-A-TADM, QUUT-A-HEH-MTSN, YAH-LEH-CHN, TO-LAHL-KUT, YUL-LOUT, SEE-AHTA-COT-SCOT, YE-TAHKO, WE - PO - IT - EE, KAH-SLD, LA'H-HOM-KAN, PAH - HOW - ST - ISH, SWE-YEHM, SAH-HWILL, SE - KWAHT, KAH - HUM - KLT, YAH-KWO-BAH, WUT-SA-LE-WUN, SAH-BA-HAT, TEL-E-KISH, SWE-KEH-NAM, SIT-OO-AH, KO-QUEL-A-CUT, JACK, KEH-KISE-BE-LO, GO-YEH-HN, SAH-PUTSH, WILLIAM.

APPENDIX F

ARTICLE VI — U. S. CONSTITUTION

Debts; supremacy; oath

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

APPENDIX G

EXECUTIVE ORDER OF 1873

PART III. EXECUTIVE ORDERS PERTAINING TO RESERVES

PUYALLUP RESERVE

(Area, 1 square mile: occupied by Muckleshoot, Nisqualli, Puyallup, Skwawksnamish, Stailakoom and five other tribes; treaty December 22, 1854)

(For Executive order of January 10, 1857, see "Nisqually Reserve.")

DEPARTMENT OF THE INTERIOR
Office Indian Affairs, August 26, 1873

Sir: By the second article of the treaty concluded with the Nisqually and other Indians December 26, 1854 (Stat. at Large vol. 10, p. 1132). "a square tract containing two sections, or 1,280 acres, lying on the south side of Commencement Bay," was set apart as a reservation for said Indians, and is known as the Puyallup Reserve.

It appears from the records of this office that Governor Stevens, finding the Indians dissatisfied with the size and location of the reserve, as indicated by said treaty, agreed, at a conference held with them August, 1856, to a readjustment of said reservation, the exterior boundaries of which were surveyed and established by his order. This was done prior to the extension of the lines of the public surveys over the surrounding and adjacent lands. A map of the survey was transmitted by Governor Stevens to this office, under date of December 5, 1856, giving a description of the courses and distances of said exterior boundaries of the reserve,

as taken from the field-notes of the survey on file in the office of superintendent Indian Affairs, Washington Territory.

This reservation, as readjusted and indicated on said map, was set apart for these Indians by Executive order dated January 20, 1857. It was intended to have this reservation bounded on its western side by the waters of Commencement Bay, from the southeasterly extremity of said bay, around northwardly to the northwest corner of the reservation on the southerly shore of Admiralty Inlet. The survey was thought to be made so as to give to the Indians this frontage upon the bay, with free access to the waters thereof. More recent surveys, however, develop the fact that there is land along this shore, and outside the reservation, arising from an error of the surveyor in leaving the line of low-water mark, along the shore of said bay, and running a direct line to the place of beginning.

In a report dated March 20 last, Superintendent Milroy calls attention to this inadvertence; and for the adjustment of the Western boundary of said reservation, so that it may conform to the intentions of those agreeing to the same, as well as for the comfort and wants of the Indians, he recommends the following change, viz: Instead of the direct line to the place of beginning, to follow the shore line, at low-water mark, to the place of beginning.

Inasmuch as the lands proposed to be covered by this change are in part already covered by the grant to the Northern Pacific Railroad Company and by donation claims, I would respectfully recommend that the President be requested to make an order setting apart for the use of these Indians an addition to said Puyallup Reservation as follows, viz: All that portion of section

34, township 21 north, range 3 east in Washington Territory, not already included within the limits of the reservation. This would give them a mile of water frontage directly north of Puyallup River, and free access to the waters of Commencement Bay at that point.

Very respectfully, your obedient servant,

Acting Commissioner,

H. R. CLUM.

APPENDIX H

AMENDMENT XIV — U. S. CONSTITUTION

Section 1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LIBRARY
SUPREME COURT, U. S.
FILE
DEC 5
MICHAEL RODAK, J.

IN THE

Supreme Court of the United States

October Term 1972
No. 72-552

ROBERT SATIACUM,
Petitioner,
v.
STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR RESPONDENT IN OPPOSITION

JOSEPH D. MLADINOV,
Special Counsel to the
Prosecuting Attorney of
Pierce County, Washington,
Counsel of Record for the
State of Washington, Respondent.

946 County-City Building
Tacoma, Washington 98402
Area Code: 206
593-4231

Date: November 30, 1972.

PRESTIGE PRESS TACOMA, WASHINGTON

Page

INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional, Treaty and Statutory Provisions Involved 3
Counter-Statement of the Case 3
Argument as to Issues 6
Conclusion 11

Appendices:

Appendix A—Opinion of the Supreme Court of the State of Washington ..... A- 1
Appendix B—Constitutional Provisions ..... A- 5
Appendix C—Treaty Provisions ..... A- 6
Appendix D—Statutory Provisions A-12

TABLES OF AUTHORITY

Cases

Ashwander v. Tennessee, 297 US 288, at 347, 56 S.Ct. 466, 80 L.Ed. 688, at 711 (Feb. 17, 1936, Mr. Justice Brandeis concurring, in part), rehearing denied, 297 US 728, 56 S.Ct. 588, 80 L.Ed. 1011 (March 2, 1936) 7

Draper v. Washington, 372 US 487, at 490, n. 1, 83 S.Ct. 774, 9 L.Ed.2d 899, at 902-903, n. 1 (March 18, 1963) 5

Kautz v. Department of Game, 391 US 932, 88 S. Ct. 1725, 20 L.Ed.2d 689 (May 27, 1968), rehearing denied, 393 US 898, 89 S. Ct. 64, 21 L.Ed.2d 185 (Oct. 14, 1968) 7

Page

Cases—(Continued)

Kennedy v. Silas Mason Co., 334 US 249, at 256-257, 68 S.Ct. 1031, 92 L.Ed. 1347 at 1350-1351 (May 17, 1948) 8

Puyallup Tribe v. Department of Game, 391 US 392, at 398-399, 88 S.Ct. 1725, 20 L.Ed.2d 689, at 693-694 (May 27, 1968), rehearing denied, 393 US 898, 89 S.Ct. 64, 21 L.Ed.2d 185 (Oct. 14, 1968) ..... 7, 8 -9

Constitutional Provisions

United States Constitution:

Article VI 3

Fourteenth Amendment 3

Statutory Provisions

28 U.S.C. §1257(3) 2

RCW 75.08.260 ..... 1, 3

RCW 75.12.120 ..... 1, 3, 10

Rules

Supreme Court of the United States:

Rule 40(3) 3

Other Authorities

Annotation: 38 A.L.R. 1196, at 1198-1199 10

IN THE

Supreme Court of the United States

October Term 1972

No. 72-552

ROBERT SATIACUM,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner was found guilty (St. 162) by a unanimous verdict of a 12-person jury of a crime—that he did "wantonly waste or destroy food fish" in violation of RCW 75.12.120, which is reproduced in Appendix D hereto.

With a possible penalty of imprisonment in the county jail of not less than 30 days nor more than one year, and/or a fine of not less than $25 nor more than $1,000, [1]Petitioner was fined $75 and court costs (St. 169).

1. RCW 75.08.260 which so provides is reproduced in Appendix D hereto.

There was no written opinion in the trial Court.

The opinion of the Supreme Court of Washington, *en banc*, unanimously (9-0) affirming that Judgment and Sentence on April 13, 1972, is reprinted in Appendix A hereto, and is reported in 80 Wn.2d 492, 495 P.2d 1035. A Petition for Rehearing was denied July 19, 1972 (Petition, Appendix B, p. 17). The Remittitur is dated July 20, 1972 (Petition, Appendix C, pp. 18-19).

JURISDICTION

Petitioner is invoking (Petition, p. 4) the jurisdiction of this honorable Court pursuant to 28 U.S.C. §1257(3) which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

QUESTIONS PRESENTED

May the State, in the interest of "conserving fish resources" make it unlawful for *anyone* "to wantonly waste or destroy food fish" so that Petitioner, an enrolled member of an Indian Tribe, could be so found

guilty (St. 162) by a unanimous verdict of a twelve-person jury and be fined $75 and costs by the trial Court, despite Petitioner's claim of immunity because of a Treaty which gave members of his tribe the right of "taking fish at all usual and accustomed grounds and stations * * * in common with all citizens of the Territory"?

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions under which Petitioner claims title, rights, privileges and immunities are Article VI of, and the Fourteenth Amendment, §1, to, the Constitution of the United States—both reprinted in Appendix B.

The treaty here involved is that proclaimed on March 3, 1855, between the United States and the Puyallup Tribe of Indians, *inter alia,* reprinted in Appendix C.

The statutes of the State of Washington here involved include the following provisions of the Revised Code of Washington (RCW): 75.12.120 and 75.08.260, all of which are reprinted in Appendix D.

COUNTER-STATEMENT OF THE CASE

In accordance with this honorable Court's Rule 40(3), the State of Washington submits the following Counter-Statement:

There is a Stipulation—termed an "Agreed Statement of Facts of the Case"—between the State and the Petitioner and made *after* Petitioner's conviction

by a unanimous Jury Verdict of twelve, after the Judgment and Sentence, and after the filing of the Notice of Appeal in the trial (Superior) Court.

It was known to the Supreme Court of Washington because, except for its caption, it was reproduced in the Brief for the State in that Court (No. 42184, pp. 4 through 7).

It is as follows, with only its caption omitted:

> The following agreed statement is presented by the parties in lieu of record on appeal.
>
> AGREED STATEMENT OF FACTS OF THE CASE
>
> The defendant was charged by Information Pierce County Number 39491 in the Superior Court of Pierce County. That the said Information contained Three Counts and all acts were alleged on July 29, 1970. Count I charged the taking fish for or possessing salmon for commercial purposes taken in a salmon preserve, to wit Puyallup River Salmon Preserve, Count II unlawfully and wantonly waste or destroy food fish, Count III unlawfully carry a firearm.
>
> Defendant timely moved to suppress any and all evidence. The motion was denied by the trial court.
>
> Defendant also moved to dismiss the Information against appellant because the trial court lacked jurisdiction in the matter. The motion to dismiss because of lack of jurisdiction was based upon the fact that defendant was an Indian, and an enrolled member of the Puyallup Tribe. That on July 29, 1970 he was fishing at the usual and accustomed fishing grounds and stations, namely the Puyallup River. That at the aforesaid time and place defendant was exercising his tribal fishing rights under the Treaty of Medicine Creek. The trial court denied the motion to dismiss.
>
> The case came on for trial, by a jury, before Judge Hardyn B. Soule, on October 20, 1970. The

defendant testified at the time of trial that he was an Indian, a member of the Puyallup Tribe, and was fishing at the usual and accustomed fishing grounds and stations on the Puyallup Indian Reservation at the time of his arrest on July 29, 1970. This evidence was uncontradicted, except that defendant was not fishing on Reservation. That at the conclusion of the State's case the trial court granted defendant's motion to dismiss as to Counts I and III, but denied the motion as to Count II. Defendant again raised the question as to jurisdiction, but the trial court submitted the matter to the jury on Count II.

The jury found the defendant guilty of Count II. On November 17, 1970 the trial court denied defendant's motion for a new trial, and sentenced the defendant to pay a $75.00 fine plus costs. The defendant gave timely notice of appeal.

POINTS RELIED UPON BY DEFENDANT

1. The trial court's failure to grant defendant's motion to suppress the evidence because any and all evidence introduced at the time of trial was obtained unlawfully. The defendant had not committed any crime whatsoever at the time of his arrest on July 29, 1970.

2. The trial court was in error by not granting defendant's motion to dismiss for lack of jurisdiction.

/s/ JACK E. TANNER,
Attorney for Defendant
/s/ EUGENE OLSON
Attorney for Plaintiff

Additionally, the State ordered out the Statement of facts.[2]

---

2. References to the Stipulation will be designated as "Stip."
As this honorable Court noted in *Draper v. Washington*, 372 US 487, at 490, n. 1, 83 S.Ct. 774, 9 L.Ed.2d 899, at 902-903, n. 1 (March 18, 1963), in the State of Washington the transcription by the Court Reporter, of the testimony at a Court session, is called the "Statement of Facts" (abbreviated "St."); the official record of Pleadings, Motions, Orders and the like, is called the "Transcript" (abbreviated "Tr.")

The facts here which support the jury's unanimous verdict of guilt (St. 162) as to the waste of salmon are:

That Petitioner was seen to have five King salmon (St. 39, 50) of about 25 pounds each (St. 61); that he was seen to "dump" at least one over the side into the water (St. 50, 58).

No salmon were left in the petitioner's boat when it was landed after his arrest (St. 58).

ARGUMENT AS TO ISSUES

This honorable Court should deny the Petition for a Writ of Certiorari:

(1)

(a) When the trial Court *dismissed Count I* of the Criminal Information (Stip., fourth par., this Brief, p. 5), it removed any possible issue as to what the Petitioner's rights are to fish under the Treaty of Medicine Creek of 1855.

(b) Even without (a) above, the record in this case is far from clear on any constitutional issue arising out of a Treaty right to fish on the Reservation.

The Stipulation states:

> . . . The defendant testified at the time of trial that he was an Indian, a member of the Puyallup Tribe, and was fishing at the usual and accustomed fishing grounds and stations on the Puyallup Indian Reservation at the time of his arrest on July 29, 1970. This evidence was uncontradicted, except that defendant was not fishing on Reservation. [fourth par. this Brief, p. 4-5]

Whatever that Stipulation means, it is no clearer than what happened at the trial (St. 122-129).

The State respectfully suggests, then, that this hon-

orable Court deny the Petition, since the constitutional basis urged by Petitioner is not so clearly present as to be unavoidable. See: *Ashwander v. Tennessee,* 297 US 288, at 347, 56 S.Ct. 466, 80 L.Ed. 688, at 711 (Feb. 17, 1936, Mr. Justice Brandeis concurring in part), rehearing denied, 297 US 728, 58 S.Ct. 558, 80 L.Ed. 1011 (March 2, 1936).

(2)

The record in the case at Bar is less than comprehensive.

The case at Bar, therefore, ought not to be used as a vehicle for a determination of any fishing rights of Petitioner under the Medicine Creek Treaty of 1855 between the United States and the Puyallup Indian Tribe.

There is, on the other hand, another case to which Petitioner here is a party, which *does* have a most comprehensive record, and which involves the right of the Petitioner, that tribe, and other individuals to fish under that same Treaty. See: No. 72-481 in this honorable Court.

That case has been before this honorable Court before. See: *Puyallup Tribe v. Department of Game,* and the companion case, *Kautz v. Department of Game,* 391 US 932, 88 S.Ct. 1725, 20 L.Ed.2d 689 (May 27, 1968), rehearing denied, 393 US 898, 89 S.Ct. 64, 21 L.Ed.2d 185 (Oct. 14, 1968), a case with a most comprehensive record.

On remand to the trial Court, the record was further developed. The appeal from the trial Court was con-

sidered by the Supreme Court of Washington in 80 Wn.2d 561, 497 P.2d 171 (*En Banc,* 6-2, May 4, 1972), rehearing denied (June 30, 1972). It was following that Opinion that the Attorney General of Washington filed the Petition for a Writ of Certiorari, numbered 72-481.

The Solicitor General of the United States has also filed a Brief in that same matter in this honorable Court.

The Petitioner *in the case at Bar* has been, and still is, a party to that most comprehensive case, having been represented in the most recent stages of that case by Arnold J. Barer, Esq. of the Seattle, Washington bar.

In this context, then, Petitioner's rights to *fish* under the Treaty of Medicine Creek (1855) should be determined by this honorable Court within the most comprehensive record in No. 72-481, rather than within the record at Bar involving, as it does, the stipulation and a 169-page Statement of Facts. See and compare: *Kennedy v. Silas Mason Co.,* 334 US 249 at 256-257, 68 S.Ct. 1031, 92 L.Ed. 1347 at 1350-1351 (May 17, 1948), where the shortcomings of the record apparently were not clear until decision.

(3)

On the merits, Petitioner is suggesting that if he has the right, under the treaty, without regulation by the State, to fish on the reservation, he also has the right to "waste fish".

The Treaty does not, of course, mention any "right" to "waste fish".

In *Puyallup Tribe v. Department of Game,* 391 US 392, at 398-399, 88 S.Ct. 1725, 20 L.Ed.2d 689, at 693-684 (May 27, 1968), rehearing denied, 393 US 898, 89 S.Ct. 64, 21 L.Ed.2d 185 (Oct. 14, 1968), this honorable Court indicated:

> And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed places" may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.
>
> * * * *
>
> In other words, the "right" to fish outside the reservation was a treaty "right" that could not be qualified or conditioned by the State. But "the time and manner of fishing . . . necessary for the conservation of fish," not being defined or established by the treaty, were within the reach of state power.
>
> The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved.
>
> (391 U.S. at 398-399; 20 L.Ed.2d 693-694)

The State here suggests, then, that it may enact legislation making it unlawful "to wantonly waste or destroy food fish"[3] because it is "in the interest of conservation", and it is "necessary for the conservation of fish" and "for conserving fish resources" (391 US at 399, 20 L.Ed2d at 694).

---

3. The Washington State Legislature has specifically provided in RCW 75.12.120:

> *"Waste of food or shellfish unlawful—Purchase for canning, etc.* It shall be unlawful for any person to wantonly waste or destroy food fish or shellfish taken or caught in any of the waters of the state, or the offshore waters, and no person engaged in the canning, preserving or curing of food fish and shellfish shall purchase or engage a greater quantity than he is able to can, preserve, or cure within sixty hours after the same are taken from the water, unless such food fish or shellfish have been kept artificially chilled and in good marketable condition."

This statute is similar to that in other states blessed with fish and wild game. See: *Annotations* 38 A.L.R. 1196, at 1198-1199, and decisions supplemental thereto.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari in this matter should be denied.

Respectfully submitted,

JOSEPH D. MLADINOV,

Special Counsel to the
Prosecuting Attorney of
Pierce County, Washington,

Counsel of Record for the
State of Washington, Respondent.

946 County-City Building
Tacoma, Washington 98402

Area Code: 206
593-4231

Date: November 30, 1972.

APPENDIX A

Opinion of the Supreme Court of Washington
[Reported in 80 Wn.2d 492, 495 P.2d 1035]

No. 42184

En Banc

April 13, 1972

THE STATE OF WASHINGTON,
Respondent,
v.
ROBERT SATIACUM,
Appellant.

[1] **States — Indians — Reservation — Termination.** An Indian reservation ceases to exist, whether or not officially terminated by act of Congress, when the land previously constituting the reservation has virtually all been sold to private non-Indian owners and there is no longer in existence any distinct Indian community recognized and treated as such. An individual Indian of that tribal descent within the indicated geographical area is subject to state police power jurisdiction in common with other citizens.

[2] **Appeal and Error—Assignments of Error—Argument in Support — Necessity.** An appellant seeking review of a criminal case has the burden and obligation of examining the record and presenting to the court argument and authority in support of his contentions.

[3] **Fish — Indians — Treaties — Right to Fish in Common With Others—Unlawful Waste of Fish.** The right guaranteed by treaty to an Indian to fish "in common with all citizens of the Territory" does not provide a basis for excusing his violation of a statute prohibiting unlawful waste or destruction of food fish.

Appeal from a judgment of the Superior Court for Pierce County, No. 39491, Hardyn B. Soule, J., entered November 18, 1970. *Affirmed.*

Prosecution for violation of a fishing regulation, unlawful waste of food fish, and for unlawfully carrying a firearm. Defendant appeals from a conviction and sentence for waste of food fish.

Jack E. Tanner, for appellant.

Ronald L. Hendry, Prosecuting Attorney, Joseph D. Mladinov, Special Counsel, and *Eugene G. Olson, Chief Criminal Deputy,* for respondent.

FINLEY, J.—This is an appeal from a conviction for the wasting of food fish in violation of RCW 75.12.120. On July 29, 1970, Robert Satiacum, a member of the Puyallup Indian Tribe, was arrested while fishing in the Puyallup River Salmon Preserve. He was subsequently charged with (1) possessing salmon taken from a salmon preserve for commercial purposes, (2) unlawful waste or destruction of food fish, prohibited by RCW 75.12.120, and (3) unlawfully carrying a firearm. At trial, the court granted defendant Satiacum's motion to dismiss charges (1) and (3), but denied the motion as to charge (2). Defendant also moved to suppress any and all evidence against him and to dismiss the information on the ground that the trial court lacked jurisdiction in the matter. Both motions were denied. The jury found the defendant guilty of unlawful waste or destruction of food fish. On November 17, 1970, the trial court denied defendant's motion for a new trial and imposed sentence, fining Mr. Satiacum $75 and court costs. He has appealed.

Appellant first contends that the trial court erred in failing to dismiss the information in this case for lack of jurisdiction. Though his brief on appeal provides neither authority nor reasoning to support his contention, he claims that our statement in *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 422 P.2d 754 (1967), that the Puyallup Indian Reservation has ceased to exist, is wrong.

[1] We do not agree. For purposes of determining the jurisdiction of state or federal courts, the Puyallup Indian Reservation *has* ceased to exist. The lands

which constituted the reservation (with the exception of two small tracts presently being used as cemeteries totaling 22 out of the original 18,000 acres have been sold to non-Indian citizens of this state pursuant to Act of April 28, 1904, ch. 1816, 33 Stat. 565 (1904), which authorized the Indians to convey their allotted lands in fee simple free of all restrictions. Regardless of whether the reservation has been officially and finally terminated by act of Congress, we are convinced that the federal jurisdiction made applicable to "Indian Country" by 18 U.S.C.A. § 1152 has ceased to exist because the Puyallup Indians have sold virtually all of their lands, and because any distinct Indian community recognized and treated as such by the United States government has ceased to exist. See *United States v. Sandoval,* 231 U.S. 28, 46, 58 L. Ed. 107, 34 S.Ct. 1 (1913).

Since the Indian lands have been sold and an Indian community no longer exists within the boundaries of the former Puyallup Indian Reservation, the State of Washington may, under the circumstances of this case, exercise its police power jurisdiction over Mr. Satiacum, a Puyallup Indian, in common with its jurisdiction over all other citizens of this state. In *Seymour v. Superintendent of State Penitentiary,* 368 U.S. 351, 7 L. Ed. 2d 346, 82 S. Ct. 424 (1962), the United States Supreme Court overruled our decision supporting state court jurisdiction over a burglary committed in the Colville Indian Reservation. The result we reach in the instant case is consistent with the ultimate decision in *Seymour,* since in that case it appears that a recognizable Indian community had continued to exist on the reservation land, and the continued existence of that reservation and of federal jurisdiction over it had been implicitly recognized in several subsequent congressional enactments.

[2] Appellant also contends that the trial court erred in refusing to grant his motion to supress all the evidence against him in this case because he had not committed a crime of any kind at the time of his arrest. Again, there is no argument or legal authority in appellant's brief to support this contention. It is

appellant's burden and obligation to examine the record and to present to this court any possible grounds upon which it might be said that "appellant had not committed a crime of any kind at the time of his arrest." He has not done so; in fact, all the evidence we find in the record supports his conviction.

[3] We note in passing that if appellant's contention is that he did not commit a crime because he was merely exercising the fishing rights guaranteed to him by the Medicine Creek Treaty, any such contention is without merit in this case. The right to fish "in common with all citizens of the Territory" guaranteed by that treaty does not include the right wantonly to waste food fish. There can be no doubt that prohibition of the wasting of food fish is a conservation measure which is "reasonable and necessary to preserve the fishery," and is well within the police power of the State of Washington. *Department of Game v. Puyallup Tribe, Inc., Supra* at 261.

HAMILTON, C.J., ROSELLINI, HUNTER, HALE, NEILL, STAFFORD, WRIGHT, and UTTER, JJ., concur.

APPENDIX B

CONSTITUTIONAL PROVISIONS

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

Article VI

"All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

"The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Fourteenth Amendment

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

TREATY PROVISIONS

Treaty proclaimed March 3, 1855, between the United States of America and the Puyallup Tribe of Indians, *inter alia*:

560

* * * * *

NISQUALLY, PUYALLUP, ETC. [4]

FRANKLIN PIERCE, President of the United States of America, to all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, head men, and delegates of the Nisqually, (561)
Puyallup, Steilacoom, Squawskin, S'Homamish, Steh-chass T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands

---

4. This has been called the "Treaty of Medicine Creek", 10 Stat. 1132. This reproduction of the Treaty is from *A Compilation of All the Treaties Between the United States and the Indian Tribes*, Govt. Print. Office, Washington. D.C., 1873, which was "prepared under the provisions of the Act of Congress, approved March 3, 1873, entitled 'An Act to provide for the preparation and presentation to Congress of the revision of the laws of the United States, consolidating the laws relating to post roads, and a code relating to military offenses, and the revision of treaties with the Indian Tribes now in Force'." Pagination is as in that Compilation.

lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound near the mouth of the Shenah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon

the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, (562) roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE 3. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years, fifteen hundred dollars each year; for the next five years, twelve hundred dollars each year; and for the next five years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall

each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the (563) same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President, and payment be made accordingly therefor.

ARTICLE 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent,

the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in (564) their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Proclaimed March 3, 1855.

APPENDIX D

STATUTORY PROVISIONS

REVISED CODE OF WASHINGTON (RCW)

* * *

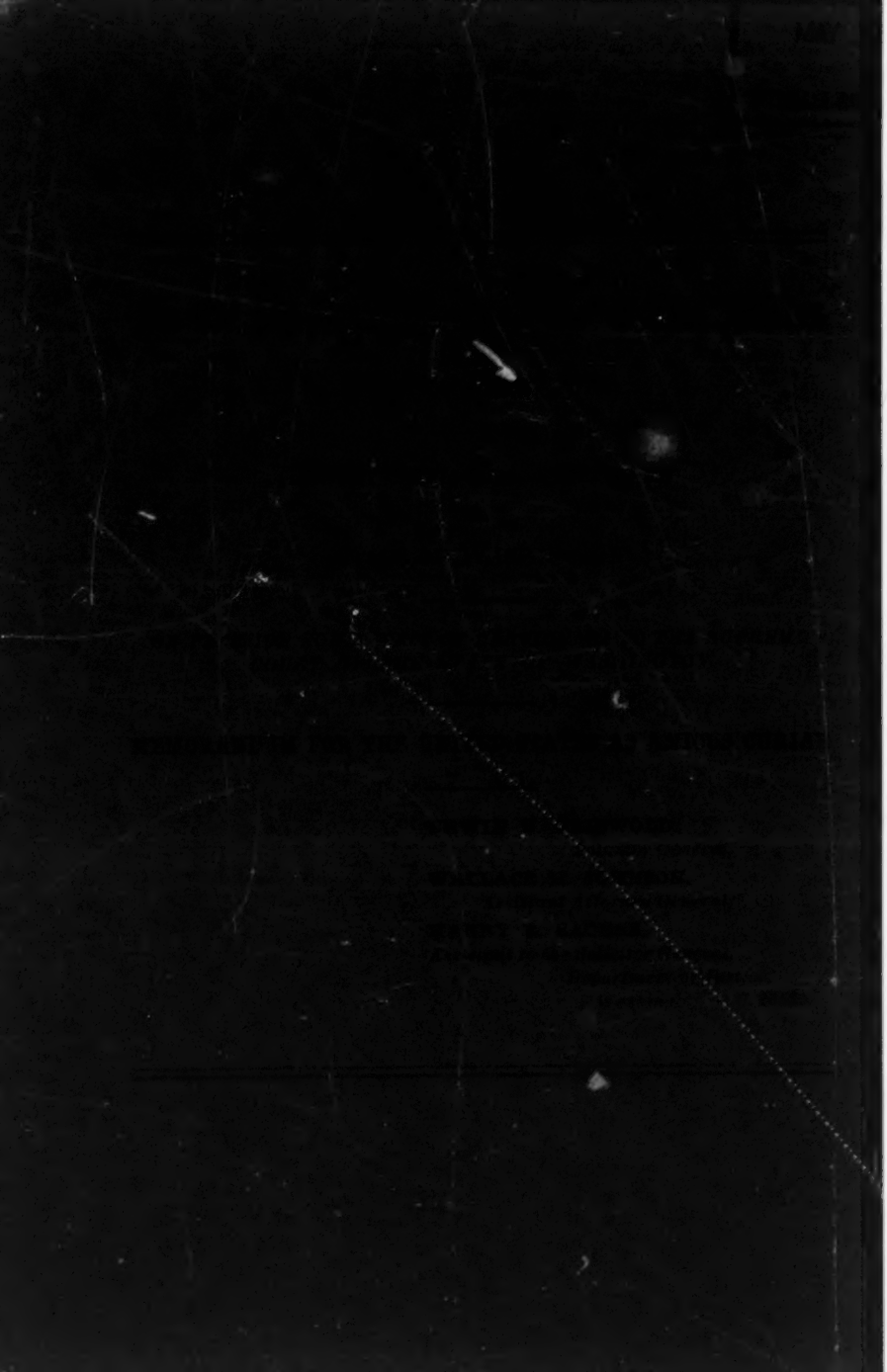
[Fisheries Code of the State of Washington]

* * *

75.12.120 Waste of food or shellfish unlawful — Purchase for canning, etc. It shall be unlawful for any person to wantonly waste or destroy food fish or shellfish taken or caught in any of the waters of the state, or the offshore waters, and no person engaged in the canning, preserving, or curing of food fish and shellfish shall purchase or engage a greater quantity than he is able to can, preserve, or cure within sixty hours after the same are taken from the water, unless such food fish or shellfish have been kept artificially chilled and in good marketable condition.

* * *

75.08.260 General penalty for violations. Unless otherwise provided for in the fisheries code any person who violates any of the provisions of the fisheries code, or any of the rules or regulations of the director made pursuant thereto, or who aids or abets or assists in the violation thereof, shall be guilty of a gross misdemeanor, and upon a conviction thereof shall be punished by imprisonment in the county jail of the county in which the offense is committed for not less than thirty days or more than one year, or by a fine of not less than twenty-five dollars or more than one thousand dollars, or by both such fine and imprisonment.



In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-552

ROBERT SATIACUM, PETITIONER

v.

STATE OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of January 8, 1973, inviting the Solicitor General to express the views of the United States in this case.

1. Petitioner, Robert Satiacum, is an enrolled member of the Puyallup Indian Tribe. The Puyallup Tribe is one of the tribes which was a party to the Treaty of Medicine Creek signed on December 26, 1854, and ratified by the Senate on March 3, 1855. 10 Stat. 1132-1137. See *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392. The treaty, in return for the Tribe's relinquishment of large areas of land (Article I), provided a Reservation for the Tribe (Article II)

503-158—73

which was subsequently defined and enlarged by executive order of President Pierce issued January 20, 1857, and of President Grant issued September 6, 1873. The treaty gave the Tribe exclusive use of the Reservation, and also gave the Tribe the right "of taking fish, at all usual and accustomed grounds and stations * * * [outside the Reservation] in common with all citizens of the Territory" (Article III). In *Puyallup Tribe* v. *Department of Game, supra,* this Court interpreted that language as allowing state regulation of off-reservation fishing if the regulation is necessary for the conservation of fish. State fishing regulations generally do not apply to on-reservation fishing (compare *McClanahan* v. *Arizona Tax Commission,* No. 71–834, decided March 27, 1973; *Williams* v. *Lee,* 358 U.S. 217).

The Puyallup Tribe continues to exist and is one of the tribes which adopted a constitution and bylaws under the Indian Reorganization Act of 1934, 48 Stat. 984. Though most of the land within the Reservation has been allotted, freed from restriction and disposed of, some tribal land remains and, significantly, the Tribe has never disposed of the bed of the Puyallup River or their fishing rights. Congress has never terminated the Reservation and the Department of the Interior recognizes the continued existence of the Reservation and the Tribe.

2. Petitioner, while in a boat well into Commencement Bay, and thus neither in the Puyallup River nor within the limits of the Puyallup Reservation (Tr. 9,

78, 81, 122, 126),[1] was arrested by Washington State authorities and charged with (1) possessing salmon taken from a salmon preserve for commercial purposes, (2) unlawful waste or destruction of food fish, and (3) unlawfully carrying a firearm. At trial, petitioner moved to dismiss all three charges for lack of jurisdiction, alleging that the offenses were committed while petitioner "was fishing at his 'usual and accustomed' fishing stations under the Treaty of Medicine Creek" (Tr. 141, 164). The court dismissed the charge of unlawfully carrying a firearm after determining that petitioner had a license to carry the gun and had not used the gun in an unlawful manner (Tr. 101). The court also dismissed the charge of possessing salmon taken from a salmon preserve on the premise that petitioner is a treaty-protected Indian who was fishing off reservation at usual fishing places (see Tr. 137–140) and on the ground that "nobody could know whether the regulation was reasonable or necessary" and that "A regulation is necessary but not total prohibition" (Tr. 139–140).

The court refused to dismiss the charge of wasting fish on the ground that Indians have no right to waste fish (Tr. 141). That charge, therefore, went to the jury. The testimony showed that when the game wardens approached petitioner's boat he threw overboard three salmon that he had previously caught and

[1] Tr. refers to the transcript of the proceedings of the trial court (labeled "Statement of Facts"). We are lodging a copy of the transcript with the Clerk.

34 Stat. 325, 377; Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1050; Act of June 30, 1919, c. 4, 41 Stat. 3, 27. And the United States and the State of Washington continue to recognize a distinct Puyallup Indian community, as the Washington Supreme Court itself explicitly found in *Department of Game* v. *Puyallup Tribe,* 70 Wash. 2d 245, 252, 422 P.2d 754, 758:

> We are satisfied that so long as the United States government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do, the Superior Court for Pierce County acted without jurisdiction in making a judicial determination of the tribe's termination.
>
> Historically and uniformally the termination of federal supervision of an Indian tribe has been accomplished by the Congress through enactment of legislation.* * *

The above language was specifically reaffirmed by the Washington Supreme Court in *Department of Game* v. *Puyallup Tribe, Inc.,* 80 Wash. 2d 561, 497 P.2d 171, 174, decided subsequent to the instant case.

Moreover, regardless of changes in the status of the land, title to the river and to fishing rights would not be lost unless specifically taken or relinquished. *Menominee Tribe* v. *United States,* 391 U.S. 404; *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620.

5. We agree with the State of Washington that the present case is not a proper one for determining the continued existence of the Puyallup Reservation

or residual on-reservation fishing rights of the Puyallup Tribe, because of the inadequacy of the record below. We disagree, however, with the State's suggestion that these issues could be decided in *Puyallup Tribe* v. *Department of Game*, 72–746, certiorari granted March 19, 1973. That case is concerned solely with off-reservation fishing rights and presents no issue concerning the existence of the Reservation.

In order to enable the latter question to be determined on the basis of a proper factual record, the United States has brought a suit in the United States District Court for the Western District of Washington, to enjoin the enforcement of state fishing laws within the Reservation. On January 29, 1973, that court decided the case adversely to the United States on the ground that the Reservation no longer exists. *United States* v. *The State of Washington*, No. 39–71C3. An appeal from that decision by the United States is now pending in the court of appeals.

6. In our view petitioner was, on this record, properly convicted of unlawful waste or destruction of food fish outside the Reservation. However, because the court below, in affirming the conviction, apparently did not decide whether the record supported the conviction on that ground and instead held that the Reservation no longer exists (on the basis of a record wholly inadequate for determination of that federal question), we believe this Court should grant the petition for a writ of certiorari, vacate the judgment of the Washington Supreme Court and remand the

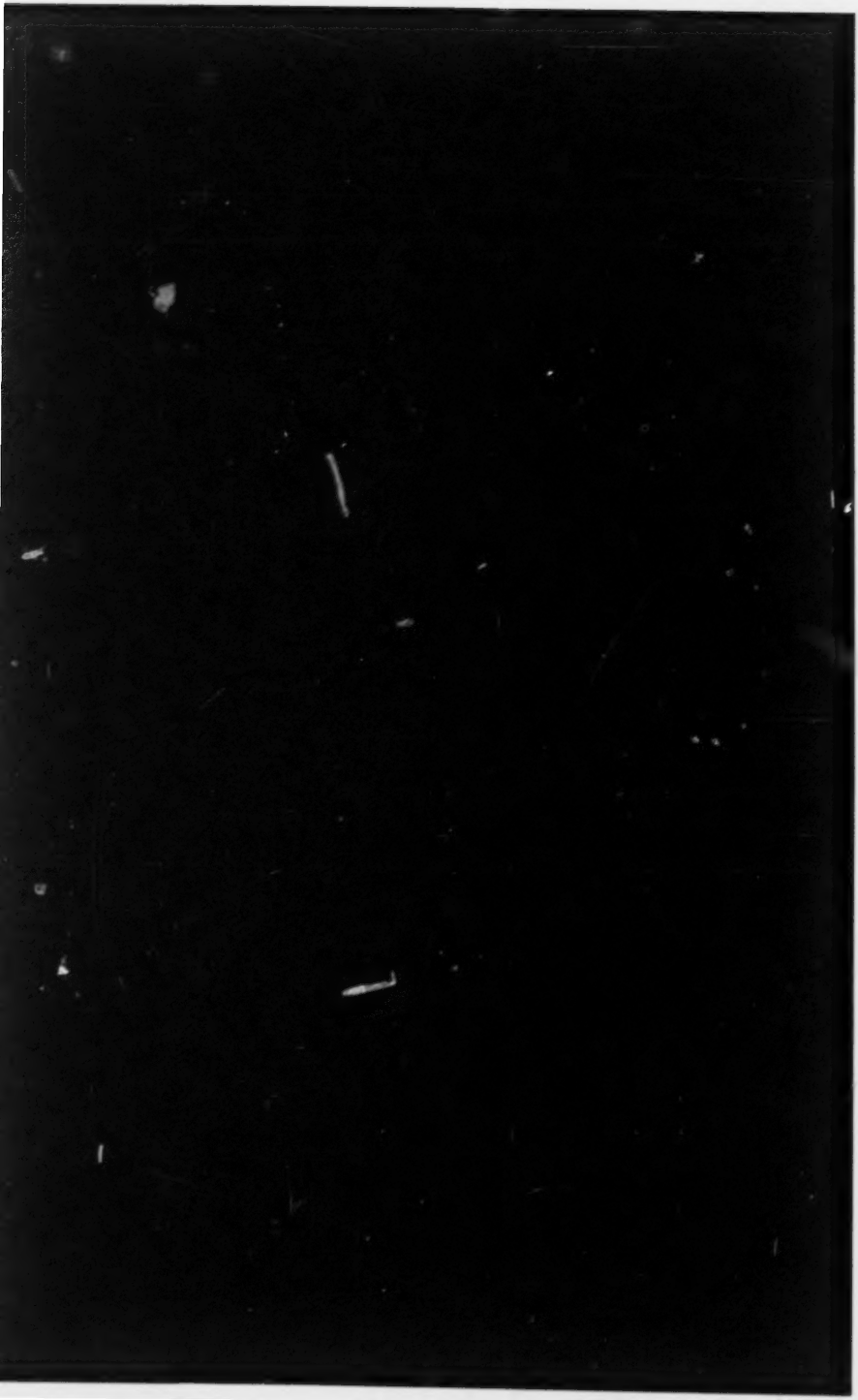
case to that court for a determination of whether it would affirm the conviction regardless of whether the Reservation still exists.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
HARRY R. SACHSE,
Assistant to the Solicitor General.

MAY 1973.

U.S. GOVERNMENT PRINTING OFFICE, 1973



UPREME COURT, U.S.

FILED

AUG 1 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1972

No. 72-552

ROBERT SATIACUM,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR RESPONDENT IN REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

JOSEPH D. MLADINOV,
Special Counsel to the
Prosecuting Attorney of
Pierce County, Washington,
Counsel of Record for the
State of Washington, Respondent.

946 County-City Building
Tacoma, Washington 98402

Area Code: 206
593-4231

Date: July 31, 1973.

PRESTIGE PRESS TACOMA, WASHINGTON

INDEX

page

I 2

II 6

Conclusion 9

Appendix A A-1

Appendix B A-6

TABLES OF AUTHORITY

Cases

Black v. Cutter Laboratories, 351 US 292, at 297, 76 S.Ct. 824, 100 L.Ed. 1188, at 1196 (June 4, 1956), rehearing denied, 352 US 859, 77 S.Ct. 21, 1 L.Ed. 2d 69 (Oct. 8, 1956) 8

Cramp v. Board of Public Instruction, 368 US 278, at 281, 82 S.Ct. 275, 7 L.Ed. 2d 285, at 288 (Dec. 11, 1961) 5

Department of Game v. Puyallup Tribe, 70 Wash. 2d 245, 252, 422 P.2d 754, 758 6

Department of Game v. Puyallup Tribe, Inc., 80 Wash. 2d 561, 497 P.2d 171, 174, cert. granted, U.S. , S.Ct. , 36 L.Ed. 2d 177 (March 19, 1973) 3, 6

Murdock v. Mayor etc. of Memphis, 20 Wall. 590, at 636, 22 L.Ed. 429, at 443-444 (January 11, 1875) 5

United States v. State of Washington, No. 39-71C3, appeal pending, No. 73-1793 (USCA-9) 7, 8

Rules

Supreme Court of the State of Washington: Administrative Rules of Supreme Court of Washington (SAR), Rule 17(1) 3, 4

Court of Appeals of the State of Washington: CAROA 14 (8), 76 Wn.2d cvi-cvii 2

page

TABLES OF AUTHORITY—(Continued)

Other Authorities

Medicine Creek Treaty 3

Richard F. Jones, *The Role of Official Headnotes in Legal Research*, 59 Law Library Journal 277-283 (1966) 4

IN THE

Supreme Court of the United States

October Term 1972

No. 72-552

ROBERT SATIACUM,
Petitioner,
v.
STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR RESPONDENT IN REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the request of this honorable court[1] for the reply of the State of Washington to the memorandum for the United States as amicus curiae.

---

1 The request of this honorable court was communicated to counsel by a letter of the Clerk dated June 11, 1973.

I

The memorandum notes that:

(a) "Petitioner, while in a boat well into Commencement Bay, and thus neither in the Puyallup River nor within the limits of the Puyallup Reservation (Tr. 9, 78, 81, 122, 126)" . . .

(Memorandum, pp. 2-3)

(b) "was arrested by Washington State authorities and charged with (1) possessing salmon taken from a salmon preserve for commercial purposes, (2) unlawful waste or destruction of food fish." . . .

(Memorandum, p. 3)

(c) The trial court

. . . "dismissed the charge of possessing salmon taken from a salmon preserve on the premise that petitioner is a treaty protected Indian who was fishing off reservation at usual fishing places (see Tr. 137-140) and on the ground that 'nobody could know whether the regulation was reasonable or necessary' and that 'A regulation is necessary but not total prohibition' (Tr. 139-140)." [2]

(d) "The trial court 'refused to dismiss the charge of wasting fish on the ground that Indians have no right to waste fish (Tr.

---

[2] No appeal was taken from the dismissal of this charge, although the rules promulgated by the Supreme Court of Washington provide for an appeal by the state in a criminal case to an intermediate Court of Appeals. See: CAROA, Rule 14 (8), 76 Wn.2d cvi-cvii, as follows:

"In criminal cases the state may appeal, upon giving the same notice as is required of other parties, when the error complained of is based on the following: (1) The setting aside of an indictment or information; (2) The sustaining of a demurrer to an indictment or information; (3) An order arresting judgment on any grounds; (4) An order granting to anyone, convicted by a jury, a new trial on any grounds; (5) Any order which in effect abates or determines the action, or discontinues the same, otherwise than by a verdict or judgment of not guilty."

141) . . . The jury returned a verdict of guilty of destroying food fish (Tr. 162) and the court fined petitioner $75."

(Memorandum, pp. 3-4)

(e) "On appeal, the Supreme Court of Washington affirmed the conviction."

(Memorandum, p. 4)[3]

The state would note that the headnote prepared by the official reporter of the Supreme Court of Washington would appear to recognize this as a ruling which was a basis for the Supreme Court's judgment. The headnote, keyed to this ruling, states:

> [3] **"Fish—Indians—Treaties—Right to Fish in Common With Others—Unlawful Waste of Fish.** The right guaranteed by treaty to an Indian to fish 'in common with all citizens of the Territory' does not provide a basis for excusing his violation of a statute prohibiting unlawful waste or destruction of food fish."
>
> (80 Wn.2d at 492)

The Administrative Rules of the Supreme Court of Washington (abbreviated SAR) provide that the Supreme Court shall appoint a "reporter for the decisions of the court" (76 Wn.2d at xxii, Rule 17(1)), and further provide:

---

[3] The Supreme Court of Washington ruled:

"[3] We note in passing that if appellant's contention is that he did not commit a crime because he was merely exercising the fishing rights guaranteed to him by the Medicine Creek Treaty, any such contention is without merit in this case. The right to fish 'in common with all citizens of the Territory' guaranteed by that treaty does not include the right wantonly to waste food fish. There can be no doubt that prohibition of the wasting of food fish is a conservation measure which is 'reasonable and necessary to preserve the fishery,' and is well within the police power of the State of Washington. *Department of Game v. Puyallup Tribe, Inc., Supra* at 261."

(80 Wn.2d 492, at 495, 495 P.2d 1035, at 1036).

"(4) He shall prepare the decisions for publication in the weekly advance sheets by giving the title of each case, the classification of the points decided, and the names of counsel, and shall prepare a subject index to each book and prefix a table of cases reported. When the decisions published in a volume of advance sheets approximately equal those to be published in the corresponding permanent volume, the volume of advance sheets shall be closed, and the reporter shall prepare a cumulative subject index covering such volume, to be published in the last book thereof.

"(5) He shall prepare the decisions for publication in the permanent volumes by giving the title of each case, a syllabus of the points decided, and the names of counsel, and shall prepare a full and comprehensive index of each volume, and prefix a table of cases reported.

(6) He shall furnish to each of the justices proof sheets of the decisions written by such justice, as the same are to appear in the bound volume, and, after examination, the justice will return them to the reporter."

(76 Wn.2d at xxiii)

The special status of the official headnotes in the Reports of the Supreme Court of Washington has already been delineated by the Reporter of Decisions who has been the reporter continuously since 1961 beginning at 57 Wn.2d, and is at present, 83 Wn.2d. See: Richard F. Jones, *The Role of Official Headnotes in Legal Research*, 59 Law Library Journal 277-283 (1966).

(f) . . . "We agree that while fishing off-reservation a Puyallup Indian has a right to fish in usual and accustomed places but that right does not include a right wantonly to destroy food fish. And there is no doubt that petitioner is subject to state court jurisdic-

> tion with respect to such an off-reservation offense."
>
> (Memorandum, p. 4)
>
> ". . . In our view petitioner was, on this record, properly convicted of unlawful waste or destruction of food fish outside the Reservation."
>
> (Memorandum, p. 7)

In this setting, then, the state would respectfully suggest that there is, by the ruling of the Supreme Court of Washington on this point, an adequate, independent, nonfederal ground for the judgment of the Supreme Court of Washington; and this honorable court has consistently not accepted review of such a judgment, even when a federal question also might be involved, and, indeed, even possibly not have been properly decided by a state supreme court. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, at 281, 82 S.Ct. 275, 7 L.Ed.2d 285, at 288 (Dec. 11, 1961); *Murdock v. Mayor etc. of Memphis*, 20 Wall. 590, at 636, 22 L.Ed. 429, at 443-444 (January 11, 1875).

II

The memorandum notes that:

(a) . . . "And the United States and the State of Washington continue to recognize a distinct Puyallup Indian community, as the Washington Supreme Court itself explicitly found in *Department of Game v. Puyallup Tribe*, 70 Wash. 2d 245, 252, 422 P. 2d 754, 758:

> 'We are satisfied that so long as the United States government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do, the Superior Court for Pierce County acted without jurisdiction in making a judicial determination of the tribe's termination.
>
> 'Historically and uniformally the termination of federal supervision of an Indian tribe has been accomplished by the Congress through enactment of legislation. * * * '

The above language was specifically reaffirmed by the Washington Supreme Court in *Department of Game v. Puyallup Tribe, Inc.*, 80 Wash.2d 561, 497 P.2d 171, 174, decided subsequent to the instant case."[4]

(Memorandum, p. 6)

(b) . . . "The existence of the Reservation, a federal question, was not at issue in the trial court and consequently there was neither an

---

[4] As noted in the memorandum, p. 7, this honorable court granted the petition for writ of certiorari on March 19, 1973. US , S.Ct. , 36 L.Ed. 2d 177.

evidentiary nor legal development of the matters relevant to such a question.[3]"

"[3] The Washington Supreme Court had previously expressed the view that the Reservation no longer exists. *Department of Game v. Puyallup Tribe*, 70 Wash. 2d 245, 253, 261, 422 P.2d 754 (Sup. Ct.) On review of that decision, however, this Court specifically found it unnecessary to reach that question. *Puyallup Tribe, supra*, 391 U.S. at 394, n. 1."

(Memorandum, pp. 4-5)

(c) "We agree with the State of Washington that the present case is not a proper one for determining the continued existence of the Puyallup Reservation or residual on-reservation fishing rights of the Puyallup Tribe, because of the inadequacy of the record below."

(Memorandum, pp. 6-7)

(d) In order to determine the issue of the existence of the reservation,

. . . "on the basis of a proper factual record, the United States has brought a suit in the United States District Court for the Western District of Washington, to enjoin the enforcement of state fishing laws within the Reservation. On January 29, 1973, that court decided the case adversely to the United States on the ground that the Reservation no longer exists. *United States v. The State of Washington*, No. 39-71C3. An appeal from that decision by the United States is now pending in the court of appeals."

(Memorandum, p. 7)

The memorandum decision of the United States District Court, dated January 29, 1973, and the Court's order, dated January 31, 1973, are reproduced in the appendix hereto, as Appendix A and Appendix B, respectively.

The appeal is No. 73-1793 in the United States Court of Appeals for the Ninth Circuit.

In this setting, then, the state respectfully suggests, it would be appropriate for this honorable court to deny the petition for a writ of certiorari.

This would appear to be particularly so where, as here, there is an adequate and independent nonfederal basis for the judgment of the Supreme Court of Washington; where the federal ground "was not at issue in the trial court so that there was neither an evidentiary nor legal development" (memorandum, p. 4) which is so desirable for appellate review; and the trial record made is inadequate, factually and legally; and where the federal ground reflects more the statements in the opinion, rather than in the judgment:[5] where there would appear to be another vehicle on the path to ripeness for the eventual resolution of the federal ground.

---

[5] This honorable court has noted:

. . . "This court, however, reviews judgments, not statements in opinions."

See: *Black v. Cutter Laboratories*, 351 US 292, at 297, 76 S.Ct. 824, 100 L.Ed. 1188, at 1196 (June 4, 1956), rehearing denied, 352 U.S. 859, 77 S.Ct. 21, 1 L.Ed.2d 69 (Oct. 8, 1956).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certorari in this matter should be denied.

Respectfully submitted,

JOSEPH D. MLADINOV,

Special Counsel to the
Prosecuting Attorney of
Pierce County, Washington,

Counsel of Record for the
State of Washington, Respondent.

946 County-City Building
Tacoma, Washington 98402
Area Code: 206
593-4231

Date: July 31, 1973.

APPENDIX A

(Memorandum Decision, United States District Court, Western District of Washington, dated January 29, 1973, in No. 39-71C3).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 39-71C3

MEMORANDUM DECISION

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

THE STATE OF WASHINGTON, *Defendant*.

The United States Government seeks to enjoin the State of Washington from the enforcement of certain laws bearing on the methods by which the steelhead trout or fish may be captured on the Puyallup River in Pierce County.

In turn, the State of Washington moves this Court for an order declaring that it possesses the power to regulate the taking of steelhead fish by Indian members and descendants of the Reorganized Puyallup Tribe from the Puyallup River.

This controversy has been before the Supreme Court of the United States and numerous intermediate courts on prior occasions. In describing this controversy, Justice William O. Douglas as the Supreme Court of the United States said in the case of *Puyallup Tribe v. Department of Game of the State of Washington* and the *Nisqually Tribe v. Department of Game of the State of Washington*, 391 U.S. 392:

> "These cases present a question of public importance which involves in the first place a construction of the Treaty of Medicine Creek made with the Puyallup and Nisqually Indians in 1854 (10 Stat. 1132) and secondly the constitutionality

of certain conservation measures adopted by the State of Washington allegedly impinging on those treaty rights."

It is interesting to note that both the United States Government and the State of Washington have asked the Supreme Court of the United States to again consider the questions that were presented to that Court. In other words, both have petitioned certiorari. Whether or not the Supreme Court of the United States will reconsider its opinion is only conjecture.

There is no doubt of the constitutionality of the laws of the State of Washington enacted by the State Legislature empowering the Department of Game to regulate the taking of steelhead fish by both non-Indians and Indians off reservations. The Court has unequivocally passed on that question. At page 398, Justice Douglas said:

> "The treaty right is in terms the right to fish 'at all usual and accustomed places.' We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places, *in the 'usual and accustomed'* manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the

United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401 (a) (2). But the manner of fishing, the size of the take, the restriction of 'commercial' fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

But the United States Government contends that in the instant case the reservation boundaries that existed in the year 1872 encompassing approximately 18,000 acres of land and some seven miles of the Puyallup River from a point a short distance from the mouth of said river and extending some seven miles upstream entitles the Indians to fish without restriction by the State because the part of the river described is within the present boundaries of the Puyallup Indian Reservation and upon which the Indians have unrestricted right to fish.

The Government contends that the Supreme Court of the United States did not determine the present claim of the United States that fishing within the 1873 boundaries is reservation fishing, vis-a-vis, non-reservation fishing because the issue was never presented to the Court.

At the request of this Court, the brief of the Puyallup Tribe prepared by the attorney for the Tribe was obtained so that this Court could determine the question of whether or not the issue had been presented to the Supreme Court. A reference to the brief shows that it was, and at page 43 of said brief and the first paragraph thereof contains the following language:

"The Indian petitioners submit that unless and until the Congress enacts a Termination Act terminating federal supervision over the Puyallup Indian reservation or constricting the boundaries of the original Puyallup Indian reservation, the original boundaries mark the area within which the fishing rights reserved to them by the Treaty

of Medicine Creek may be exercised without restriction by state laws or regulations."

It is true that in the footnote to the opinion of the Supreme Court of the United States previously referred to Justice Douglas says that the Court does not reach the issue of the present boundaries of the Puyallup Reservation, but for whatever reason the Court made that decision, the fact remains that the issue was presented.

This Court is not required to determine the conservation issue at this time. That is posed in other cases concerning the "prohibition of the use of set nets" in these fresh waters as a "reasonable and necessary conservation measure." Eventually this Court may be required, as directed by the Supreme Court of the United States, to make ultimate findings on the conservation issue and also cover the issue of equal protection implicit in the phrase "in common with."

The State of Washington and its Department of Game, pursuant to the statutory regulation regarding the taking of the said steelhead fish, may preclude the taking of said fish by any other means than the hook and line in the interest of conserving the resource.

Therefore, the motion of the United States Government to enjoin the State of Washington and its Department of Game from interfering with the taking of said steelhead fish from the Puyallup River by Indians enrolled in the Reorganized Puyallup Tribe is denied, and the motion of the State of Washington declaring said State to possess the power to regulate the taking of steelhead fish on the Puyallup River by Indian descendants of enrolled members of the Reorganized Puyallup Tribe or members of said Reorganized Puyallup Tribe is granted, and that said State, pursuant to its laws and the rules and regulations by its Department of Game shall have said power provided that said rules and regulations for the taking of said steelhead fish apply equally to all persons, Indians and non-Indians alike.

Further, the said order applies to all areas of the Puyallup River including the navigable portion thereof which is stipulated to by the parties as extending to and beyond the upstream area where the United States Government contends that the Puyallup Indian Reservation boundaries of 1873 continue to exist, and the Court finds as a fact that said reservation boundary does not continue to exist as contended by the United States.

IT IS SO ORDERED.

DONE BY THE COURT this 29th day of January, 1973.

WILLIAM N. GOODWIN
United States District Judge

APPENDIX B

(Order, United States District Court, Western District of Washington, dated January 29, 1973, in No. 39-71C3).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 39-71C3

ORDER

UNITED STATES OF AMERICA, *Plaintiff.*

vs.

THE STATE OF WASHINGTON, *Defendant.*

The Court, in its Memorandum Decision, has rejected the contention of the United States that the 1873 boundaries of the then existing Puyallup Indian Reservation still exist.

It has been twice held to the contrary. *United States v. Kopp,* 110 Fed. 160 (1901). Subsequent to that decision, the Supreme Court of Washington has reached the same conclusion in *Goudy v. Meath,* 38 Wn. 126, 80 Pac. 295; *State v. Smokalem,* 37 Wn. 91, 79 Pac. 603.

The Puyallup Allotment Act, 27 Stat. 63; the appointment of a commissioner to superintend sale of allotments, 30 Stat. 87, the consent of the United States to the removal of restrictions upon alienation by Puyallup Indians of their allotted lands, 33 Stat. 565; the legislative intent expressed in the House Committee Report No. 301, 58th Congress, Second Session (1904), in combination resulted in the almost total divestiture of the land within the 1873 reservation boundaries by the Indians. The Indian cemetery property was transferred by the Indian descendants of the members of the former Puyallup Tribe to certain individual trustees. The United States no longer supervised or claimed any right to supervise the ac-

tivities of the said trustees in the performance of their duties as trustees of the said Cemetery Trust. Ex. JX 19, recorded March 25, 1908, dated in 1906.

The Indian Agency property, which no longer was the site of the Indian Agency and the home of the supervisor, was to be sold and the proceeds distributed to the tribal descendants. In 1948 the channel of the Puyallup River was altered by the United States Corps of Engineers to prevent the annual devastating floods that inundate the lands in the Puyallup River Valley. This was a part of what is known as the Mud Mountain Dam project, and the Mud Mountain Dam was constructed to regulate the flow of the Puyallup River during the periods of heavy runoff caused by melting snow in the Cascade Mountains where the river and its tributaries have their source.

The bed of the river as it existed in 1873 and the river channel within the 1873 boundaries of the reservation have been materially changed by this flood control project.

The unrestricted sale of the allotted lands has resulted in the population growth and establishment of incorporated and unincorporated towns, industrial complexes, a municipal corporation titled The Tacoma Port Authority, and many other commercial and residential areas on the land now claimed to be within the boundary of the Puyallup Indian Reservation. An examination of the relief map exhibited by the Government shows the extent of the development of the areas.

Of the 18,000 acres more or less lying within the Government's proposed reservation boundary, only approximately 30 acres are presently claimed to be land held by the United States in trust for the reorganized tribe.

The evidence supports the conclusion that the Puyallup Indian Reservation neither legally, actually, nor practically exists, nor is there any valid reason for its existence.

It is claimed by the United States that the members of the Reorganized Tribe have some claim to the

present bed of the Puyallup River, and that water flowing over the river bed flows over reservation land, and that fish swimming in the water flowing over the reservation land may be captured by the Indians without regard to state conservation laws.

It is agreed that the Puyallup River is a navigable stream and title to the land normally is in the United States, but assuming without deciding that by establishment of the reservation and subsequent alienation of the lands bordering the river are without reference to the bed of the river, and in the instrument the Indian allottee-grantor retains some interest in the riverbed, does it follow that the combined interest of all the riparian Indian allottees who alienated their allotments but did not transfer their riparian interests revitalizes the deceased reservation so that the bed of the river is now reservation land held in trust by the United States for the benefit of the descendants of the members of the original Puyallup Tribe or the members and descendants of the members of the Reorganized Puyallup Tribe? The common sense conclusion dictates that wherever title to the land may lay, the bed of the river is not an Indian reservation, and that the State of Washington owns the fish that swim in this navigable stream and may control by its conservation laws the manner in which said fish may be taken. Assuming without deciding that the members of the Reorganized Tribe have some claim to the present bottom of the Puyallup River, it does not follow that the riverbed is the Indian Reservation. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), decided title to a riverbed but did not reestablish or revive an Indian reservation that had been extinguished by legislation. Act of 1906, 44 Stat. 148.

The Puyallup tribal right to unrestricted fishing on the waters of the Puyallup River that flowed through the 1873 reservation boundaries was extinguished

when the reservation was extinguished and reorganization of the tribe did not revive it.

IT IS SO ORDERED.

DONE BY THE COURT this 31st day of January, 1973.

WILLIAM N. GOODWIN
United States District Judge

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1973

SATIACUM *v.* WASHINGTON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 72-552. Decided October 15, 1973

State courts should have determined where petitioner's alleged offenses occurred with respect to boundaries of present or former Indian reservation, since if they occurred outside those boundaries the State Supreme Court unnecessarily reached a federal question in deciding that the reservation as such had ceased to exist.

Certiorari granted; 80 Wash. 2d 492, 495 P. 2d 1035, vacated and remanded.

PER CURIAM.

It appearing that petitioner might have been fishing at a location outside the boundaries of what is, or was, the Puyallup Indian Reservation when the acts with which he is charged were committed, and, if this were so, that the Supreme Court of Washington then unnecessarily addressed, and determined, the federal question whether the Puyallup Reservation "has ceased to exist," the petition for a writ of certiorari is granted, the judgment of the Supreme Court of Washington is vacated, and the case is remanded to that court for resolution by the state courts of the factual issue whether the alleged offenses took place outside the boundaries of what is, or was, the Reservation.